United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7203

To be argued by
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Plaintiffs-Appellants,

-against-

HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK, and ROBERT P. WHALEN, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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Table of Contents

Table of Cases

Other Authorities

UNITED STATES COURT OF APPEALS
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NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO, and DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

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BRIEF FOR DEFENDANTS-APPELLEES

Questions Presented

1. Whether this action is moot?

2. Whether plaintiffs lack standing to maintain this action?

3. Whether 10 NYCRR §§ 86.17, 86.21(k) conflicts with Labor Management Relation Act §§ 7, 8 (29 U.S.C. §§ 157, 158)?

Regulations Construed

10 NYCRR § 86.21(k) provides:

> "Effective for fiscal years ending in 1976 and thereafter, allowable costs per unit of service (inpatient day, clinic visit, etc.) in a base year will not include any cost increases over the prior year which are in excess of the inpatient factor used by the Department in determining the reimbursement rate in effect during such base year unless the cost increases in the base year resulted in a rate revision during the rate year in accordance with Section 86.17."

10 NYCRR § 86.17 provides:

> "(a) The State Commissioner of Health may consider only those applications for prospective revisions of certified rates which are based on
>
> (1) requests for revisions in 1975 reimbursement rates for cost increases incurred prior to the effective date of this section;
>
> (2) errors made in the rate computation process or in the submission by a medical facility which have been brought to the attention of the Commissioner within the time limits prescribed in Section 86.16;
>
> (3) significant increases in the over-all operating costs of a medical facility resulting from the implementation of additional programs, staff or services specifically mandated for the facility by the Commissioner;

(4) significant increases in the overall operating costs of a medical facility resulting from capital renovation, expansion, replacement or the inclusion of new programs, staff or services approved for the medical facility by the Commissioner;

(5) requests for waivers of any provisions of Part 36 for which waivers may be granted by the Commissioner as prescribed in specific sections; and

(6) changes in the method of providing services which result in a lower over-all cost for the services provided.

Statement of the Case

This is an appeal from a judgment of the United States District Court, Southern District of New York (Hon. Charles Mr. Metzner, J.) entered March 26, 1976, denying plaintiffs' motion for a preliminary injunction and dismissing the complaint (A.58).*

Plaintiffs are unions representing hospital employees. Their complaint alleged that 10 NYCRR §§ 86.17 and 86.21(k) violated the Supremacy Clause of Article VI of the Constitution in that they violated the requirement

* Numbers in parenthesis preceded by "A" refer to pages of the Appendix.

of the Social Security Law [42 U.S.C. § 1396(a)(13)(D)] which requires that Medicaid providers be reimbursed for the reasonable cost of their services (A.11-12); that these regulations were invalid because they had not been approved by the Department of Health, Education and Welfare under 42 U.S.C. § 1396a(b) (A.12-13) and that they violated their members' collective bargaining rights under the Labor Management Relations Act [29 U.S.C. §§ 157-158] (A. 13-14). They sought judgment declaring the regulations null and void for those reasons and requiring the State to reimburse health care providers for their actual, reasonable current costs (A. 15-16).

In essence, plaintiffs claim that they cannot negotiate a wage increase because the State will not reimburse the hospitals for it (A. 11-12, 27 et seq.).

Plaintiffs moved for a preliminary injunction (A. 18-19). The defendants opposed on the grounds that there was no present case or controversy; that the plaintiffs lacked standing to bring the action; that plaintiffs' collective bargaining rights were not

infringed and that in any event, the State regulations did not transgress the requirement of cost relatedness. (Memorandum of Law for defendants).

Although holding that the action was not premature (A. 50) the District Court dismissed the action on the grounds that the plaintiffs lacked standing to raise issues which were the concern of the hospitals and the patients (A. 51-54), and that the State regulations did not violate Federal Labor Laws (A. 54-57).

Subsequent Developments

Following the dismissal of the instant case, the issues of whether 10 NYCRR § 86.21(k) violated the requirement of reimbursement for actual costs and was otherwise void for want of prior approval by HEW, were raised by the voluntary hospitals in the case of Hospital Association of New York State, Inc., et al. v. Toia, et al., 76 Civ. 2027 (MEL)(S.D.N.Y.). In an oral decision rendered from the bench on July 29, 1976, Judge Lasker found that 10 NYCRR § 86.21(k), inter alia, was

invalid for want of prior approval by HEW (Steno. minutes, pp. 16-21). A judgment signed July 30, 1976, enjoined the enforcement of § 86.21(k) unless and until approval by the Secretary. An appeal by the State from the judgment has been docketed (#76-6117). A motion for a stay pending appeal and a preference was denied on August 17, 1976 (per Van Graafeiland, C.J. and Kelleher, D.J.). However, the day before, HEW approval had been granted to § 86.21(k) and one other of the three amended regulations that had bee submitted for approval. Accordingly, this Court orally directed counsel to return to Judge Lasker for purposes of determining whether the regulations would be deemed effective upon promulgation or HEW approval. This direction is being submitted to Judge Lasker in the form of a stipulation to be "So Ordered" by a Judge of this Court.

POINT I

THIS ACTION IS MOOT.

The approval by the Secretary of Health, Education and Welfare of 10 NYCRR § 86.21(k) has rendered moot

plaintiffs' claim that the regulation was invalid for want of prior approval. Thus, there is no presently subsisting case or controversy as to this claim. Golden v. Zwickler, 394 U.S. 103, 110 (1969). See also Steffel v. Thompson, 415 U.S. 452, 458-459 (1974); O'Shea v. Littleton, 414 U.S. 488, 495 (1974).

Moreover, if the regulation is effective as of the time of its approval as is claimed by the plaintiffs in Hospital Association, etc. v. Toia, supra, a view that is concurred in by HEW, see 45 CFR § 250.30(a)(2) and telegram from HEW Counsel to State Health Department Counsel dated August 26, 1976, the current year would remain the "base year" under § 86.21(k). The alleged ceiling on wage increases imposed by that regulation would not affect hospitals' ability to grant wage increases for contracts negotiated for the current year.

The history of this entire problem demonstrates how closely it is tied to Federal and State fiscal conditions and the willingness of the Federal government to assume an additional portion of the financial burden of

Medicaid, as has been widely proposed and pressed upon the Federal government by State and local authorities. Accordingly, the possibility that future labor contracts will be affected is speculative indeed and should not be presumed, Golden v. Zwickler, supra; O'Shea v. Littleton, supra. See too Rizzo v. Goode, 423 U.S. 362, 44 LW 4095.

POINT II

PLAINTIFFS LACK STANDING IN THIS CASE.

As the District Court pointed out plaintiffs lack standing to maintain this action. The rights that they seek to vindicate are not labor's, but those of the hospitals' and their patients (A. 53). Plaintiffs are, therefore, not the proper parties to maintain this action, Warth v. Seldin, 422 U.S. 490, 499 (1975); Flast v. Cohen, 392 U.S. 83, 100 (1968); Sierra Club v. Morton, 405 U.S. 727, 732 (1972). Unlike the case of Barlow v. Collins, 397 U.S. 159, 164-165 (1970) where the enabling statute was designated to protect the interests of the plaintiffs therein, the Medicaid reimbursement regulations pertain only to the relationship between the State and the health care provides. The latter's employees are not "Third-party beneficiaries."

Plaintiffs cannot bring themselves within the "zone of interests" test on the theory that although third parties, the State's regulation causes "specific harm" to them. As we show in Point III, infra, § 86.21(k) imposes no legal bar to a wage increase for its members, unlike the regulation that would have barred a party from employment altogether, Cotovsky-Kaplan Physical Therapy Assoc. Ltd. v. United States, 507 F. 2d 1363, 1366-1367 (7th Cir., 1975), relied upon by them, br. p. 16. The same may be said for National Association of Letter Carriers v. Independent Postal System, 470 F. 2d 265, 270-271 (10th Cir., 1972) app't's br., p. 12, since a successful lawsuit would eliminate a form of competition in the industry in which they are employed. The difference in degree of interest as compared to the present case is patent. However, plaintiffs candidly note that even the rationale of Cotovsky-Kaplan has not been universally accepted, citing, id. p.16, New Jersey Chapter Incorporated of the American Physical Therapy Association, Inc. v. Prudential Life Insurance Co. of America, 502 F. 2d 500, 504 (D. Cir., 1974) in which a District Court dismissal for want of standing was left

undisturbed (the Court affirming on other grounds), where government regulations set standards as to the reasonable costs for Medicare reimbursement purposes of physical therapy furnished to a provider by a subcontractor.

Plaintiffs' reliance, br. p. 13, upon cases where pregnant women were permitted to challenge anti-abortion laws, Roe v. Wade, 410 U.S. 113 (1972); Roe v. Ferguson, 515 F. 2d 279, 281 (6th Cir., 1975) merely serve to underscore the legal remoteness of their interest in the claims they seek to pursue.

POINT III

THE STATE REGULATIONS DO NOT CONFLICT WITH THE FEDERAL LABOR LAWS.

The federal labor laws invoked by plaintiffs as allegedly pre-empting state regulation herein have no bearing upon the instant case.

In enacting PL 93-360, Congress merely removed the pre-existing exemption of non-profit hospitals, 29 USC § 152(2), defined "health care institution" in the broadest terms, id. subd. (14) and established special machinery to be used to attempt to resolve labor disputes arising in such institutions, id. § 183. It was the intent of Congress to protect the collective bargaining rights of health care workers while at the same time protect patients from abrupt suspension of such services. Congress took particular note of a number highly disruptive recognition strikes in health care institutions that this legislation was designed to eliminate. 1974 U.S. Code, Cong. & Adm. News, pp. 3946, 3948. Included among them was the 1973 New York City hospital strike conducted by the plaintiffs, id. pp. 3954-3957.

The fact that state arbitration laws designed to avoid strikes may be pre-empted by § 183, North Shore University Hospital v. Levine, ___F. Supp. ___ (E.D. N.Y. 1975) and St. Joseph's Hospital v. Levine, ___ F. Supp. ___ (N.D.N.Y. 1975) relied upon by plaintiffs, brief pp. 22-23, has no relevance to a state regulation limiting financial reimbursement by the State to an employer and does not unlawfully interfere with collective bargaining any more than any other state law or regulation that may incidentally affect the profitability of the employer's business. The example of Waterbury Hospital and District 1199, Case # H.C. 175-732 - B.O.I., cited by plaintiffs, brief p. 24, et seq. is clearly inappropriate. The Connecticut statute provided for state approval of a hospital's budget, setting a 9% ceiling on wage increases. In the instant case, the State of New York places no statutory restraint upon wage increases of any amount. Assuming arguendo, that one accepts plaintiff's interpretation of the regulation, it is of no consequence that 10 NYCRR § 86.21(k) might not provide for any increase in labor costs as part of the Medicaid reimbursement rate.

The notion that the Governments are required to have an open pocket so as to maximize medicaid rates to pick-up any labor increases and allow for continued profitability is a novel claim, unprecedented and unacceptable, cf. Dandridge v. Williams, 397 U.S. 471, 485 (1975); Richardson v. Belcher, 404 U.S. 78, 81 (1971).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Dated: New York, New York
August 31, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for appellees herein. on the 1st day of September, 1976, he served the annexed upon the following named persons :

SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ
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Attorneys in the within entitled appeal by depositing three true and correct copies thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at One World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

ROBERT S. HAMMER

Sworn to before me this
2d day of September, 1976

Assistant Attorney General
of the State of New York